IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CWP No.929 of 2006

Date of decision 28.6.2007

Shiv Kumar Petitioner

Vs.

State of H.P. and ors. Respondents

Coram:

The Hon'ble Mr.Justice Rajiv Sharma, Judge.

Whether approved for reporting?[1] Yes.

For the Petitioner: Mr. Tarlok Chauhan, Advocate.

For the Respondents : Mr.M.S.Chandel, Advocate General, with Mr.M.A.Khan ,Deputy Advocate General, for respondents No.1 to 3.

Mr.Ajay Sharma, Advocate, for respondent No.4.

Rajiv Sharma, J.

This Court had issued the following directions in Contempt Petition(C) No.47 of 1996 on 19.3.21997 as under :

"The complaint of the petitioner is that the following directions given by this court in CWP No.287of 95 in its order dated 23.10.1995 are not obeyed by the respondents No.1 to 3.

1. The petitioner-Cooperative Society shall pay arrears of salary to respondent No.4 within three months from today and current salary regularly, provided, respondent-4 gives a certificate that he was not gainfully employed during the period in question.

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[1] Whether reporter of local papers are allowed to see the judgment ? Yes.

2. As an appeal against the judgment of acquittal in a murder case is pending in this court and there are also charges of mis-appropriation of funds against respondent-4, the petitioner-Society need not re-instate respondent-4 in service for a period of six months and within this period the enquiry shall be completed."

2. As regards the payment of arrears of salary and current salary, the stand taken by the Society is that the petitioner had produced a certificate of unemployment but it was found to be false on enquiry made by them. According to them, the petitioner was gainfully employed during the relevant period and the certificates to that effect were issued by the Pradhan of the Gram Panchayat. That statement is disputed by the petitioner, according to whom he was only an honorary Cashier in the Society which was registered in 1992 under the provisions of the Societies Registration Act. He was not receiving any salary or honorarium. According to him he was only doing free service to the Society which was registered at the instance of one members of his family. This question is a disputed question of fact and it has to be decided before we can hold the respondents to be guilty of contempt of court. In such circumstances, we are of the opinion that the stand taken by the respondents is on a bonafide impression that the petitioner had been gainfully employed during the relevant period and that is why they have not complied with the direction to pay the petitioner arrears of salary and current salary. Hence, we hold that the respondents are not guilty of contempt on the first charge.

3. However, we direct the Deputy registrar of the Cooperative Societies who is the Incharge of District at Dharamshala to hold an enquiry immediately as to whether the petitioner was gainfully employed during the relevant period. The Deputy Registrar shall conclude the said enquiry within a period of four weeks from this date and come to a conclusion whether the case of the petitioner is correct or not. If he comes to the conclusion that the petitioner was not gainfully employed, the respondents shall pay all the arrears of salary due to the petitioner upto date within a period of two weeks of such

decision. Thereafter the respondents 1 and 2 shall also pay the current salary to the petitioner every month regularly.

4. As regards the second direction give by this court to complete the enquiry against the petitioner herein with regard to the charges of mis-appropriation of funds within a period of six months, several reasons are given by the third respondent in the reply and they appear to be acceptable. We hold that the third respondent is not guilty of contempt of court. It is also noted that the person, namely the third respondent who was the Incharge of the office of Asstt. Registrar has now retired. A new official has taken charge as Asstt. Registrar. We direct the present Asstt. Registrar of Cooperative Societies, Una District to hold an enquiry in the case of mis-appropriation of funds etc. pending against the petitioner herein. Such enquiry shall commence as soon as an order is passed by the Deputy Registrar pursuant to our direction given earlier in this order. Such enquiry shall also be completed within a period of eight weeks from the date of commencement of the same.
5. In both the enquiries the concerned officers, namely, Deputy Registrar and Asstt. Registrar respectively shall give sufficient opportunity to both the parties to place their respective cases before them.
6. The Asstt. Registrar of Cooperative Societies is the third respondent before us. Whoever is the present Asstt. Registrar, he is deemed to be a party in this petition as he holds that office now. Hence the learned counsel for the third respondent may communicate this order to the third respondent.
7. However, the Deputy registrar of the Cooperative Societies at Dharamshala is not a party. Hence the Registry is directed to forward a copy of this order to the said Deputy Registrar within a week from this date. It is open to both parties to produce a copy of the order before the Deputy Registrar.

With the above direction, this petition is disposed of…."

In sequel to the direction issued by this Court the Assistant Registrar, Cooperative Societies completed the enquiry against the petitioner and prepared the report dated 10.7.1997. The copy of the report

dated 10.7.1997 was not supplied to the petitioner. The petitioner was issued a notice dated 22.9.1997 by the respondent No.4 Society terminating his services on the basis of unanimous resolution passed by it. The petitioner filed an appeal against his termination before the competent authority. The appeal was rejected by the Assistant Registrar on 29.1.2000. The petitioner filed a petition under Section 94 of the H.P. Cooperative Societies Act, 1968 before the Secretary (Cooperation) to the Government of H.P. The revision was rejected by the Additional Secretary (Cooperation) on 16.3.2006.

Mr.Tarlok Chauhan, learned counsel appearing for the petitioner had strenuously argued that the copy of the enquiry report was required to be supplied to be petitioner before the issuance of Annexure P-7 dated 22.9.1997.Mr.Chauhan has further submitted that the non supply of the copy of the enquiry report had seriously prejudiced the petitioner. Mr.M.S.Chandel, learned Advocate General and Mr.Ajay Sharma, learned Advocate had supported the impugned order.

I have heard the learned counsel for the parties and have also gone through the record carefully.

The scenario which emerges from the pleadings of the parties is that in sequel to the judgment passed by this Court on 19.3.1997 enquiry was conducted by the Assistant Registrar and he had prepared the report on 10.7.1997. The copy of the same has been supplied to the petitioner only with copy of notice dated 22.9.1997. It is no more res integra that the copy of the enquiry report as per the judgment of the Apex Court in **Managing Director, ECIL, Hyderabad and others v. B.Karunakar and others**, (1993) 4 SCC 727 has to be supplied before the Disciplinary Authority makes its mind for imposing any of the penalties. The basic concept of supplying the copy of the enquiry report to an individual is to enable him to make a representation pointing out the shortcomings,

discrepancies and violation of the procedure prescribed for conducting the enquiry. The Apex Court in Managing Director, ECIL, Hyderabad and others case (supra) has held as under:

> "What emerges from the above survey of the law on the subject is as follows:
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> Since the Government of India Act 1935 till the Forty-second Amendment of the Constitution, the Government servant had always the right to receive the report of the enquiry office/authority and to represent against the findings recorded in it when the enquiry officer/authority was not the disciplinary authority. This right was however, exercisable by him at the second stage of the disciplinary proceedings viz. when he was served with a notice to show cause against the proposed penalty. The issuance of the notice to show cause against the penalty necessarily required the furnishing of a copy of the enquiry officer's report since, as held by the Courts, the right to show cause against the penalty also implied the right to represent against the findings on the charges. This was considered to be an essential part of the 'reasonable opportunity' incorporated earlier in Section 240(3) of the GOI Act and later in Article 311(2) of the Constitution as originally enacted. The right to receive the enquiry officer's report and to show cause against the findings in the report was independent of the right to show cause against the penalty proposed. The two rights arose simultaneously only at the stage when a notice to show cause against the proposed penalty was issued. If the disciplinary authority after considering the enquiry officer's report had dropped the proceedings or had decided to impose a penalty other than that of dismissal, removal or reduction in rank, there was no occasion for issuance of the notice to show cause against the proposed penalty. In that case, the employee had neither the right to receive the report and represent against the finding of guilt nor the right to show cause against the proposed penalty. The right to receive the report had to represent against the findings recorded in it was thus inextricably connected with the acceptance of the report by the disciplinary authority and the nature of the penalty proposed. Since the Forty-second Amendment of the Constitution dispensed with the issuance of the notice to show cause against the penalty

> proposed even if it was dismissal, removal or reduction in rank, some courts took the view that the Government servant was deprived of his right to represent against the findings of guilt as well. The error occurred on account of the failure to distinguish the two rights which were independent of each other.

This Court is of the opinion that the petitioner was required to be supplied with the copy of the enquiry report dated 10.7.1997 before terminating his services on the basis of notice dated 22.9.1997. The petitioner had definitely been prejudiced by non supply of the copy of enquiry report before terminating his services. The petitioner has taken a specific ground in his appeal filed before the Assistant Registrar that the enquiry had not been conducted in accordance with law. The appellate authority has not taken into consideration at all the plea raised by the petitioner of not holding the enquiry in accordance with law in its order dated 29.1.2000. It is by now settled law that the appellate authority has to take into consideration all the grounds mentioned in the appeal.

In **Narinder Mohan Arya vs. United India Insurance Co. Ltd. and others,** (2006)4 SCC 713, their Lordships have held as under:

> We may for the aforementioned purpose take note of the extant rules operating in the field. Requirements of consideration in an appeal from an order of the disciplinary authority by the appellate authority is contained in Rule 37 whereas the provisions as regards filing of a memorial are contained in Rule 40 thereof, which read as under:
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> "37. Consideration of Appeals- (1) In case of an appeal against an order of suspension, the appellate authority shall consider whether in the light of the provisions of Rule 20 and having regard to the circumstances of the case the order of suspension is justified or not and confirm or revoke the other accordingly.
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> (2) In the case of an appeal against an order imposing any of the penalties specified in Rule 23, the appellate authority shall consider:

(a) Whether the procedure prescribed in these Rules has been complied with and if not, whether such non-compliance has resulted in failure of justice;

(b) Whether the findings are justified; and

(c) Whether the penalty imposed is excessive, adequate or inadequate, and pass orders:

I. setting aside, reducing, confirming or enhancing the penalty; or

II. Remitting the case to the authority which imposed the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case.

"40. Memorial.- An employee whose appeal under these Rules has been rejected by the Chairman/Chairman-cum-Managing Director or in whose case such appellate authority has enhanced the penalty either on appeal under Rule 24 or on review under Rule 39 (2) may address a memorial to the Chairman/Chairman-cum-Managing Director in respect of that matter within a period of a 6 months from the date the appellant received a copy of the order of such appellate authority."

The appellate authority, therefore, while disposing of the appeal is required to apply his mind with regard to the factors enumerated in sub-rule 2 of Rule 37 of the Rules. The judgment of the civil court being inter parties was relevant. The conduct of the appellant as noticed by the civil court was also relevant. The fact that the respondent has accepted the said judgment and acted upon it would be a relevant fact. The authority considering the memorial could have justifiably came to a different conclusion having regard to the findings of the civil court. But, it did apply its mind. It could have for one reason or the other refused to take the subsequent event into consideration, but as he had discretion in the matter, he was bound to consider the said question. He was required to show that he applied his mind to the relevant facts He could not have without expressing his mind simply ignored the same.

An appellate order if it is in agreement with that of the disciplinary authority may not be a speaking order but the authority passing the same must show that there had been proper application of mind on his part as regard the compliance of the requirements of law while exercising his jurisdiction under Rule 37 of the Rules.

In Apparel Export Promotion Council V. A.K. Chopra [1999(1) SCC 759] which has heavily been relied upon by Mr. Gupta, this Court stated:

"16. The High Court appears to have overlooked the settled position that in departmental proceedings, the disciplinary authority is the sole judge of facts and in case an appeal is presented to the appellate authority, the appellate authority has also the power/and jurisdiction to re-appreciate the evidence and come to its own conclusion, on facts, being the sole fact-finding authorities."

(Emphasis supplied)

The appellate authority, therefore, could not ignore to exercise the said power.

The order of the appellate authority demonstrates total non-application of mind. The appellate authority, when the rules require application of mind on several factors and serious contentions have been raised, was bound to assign reasons so as enable the writ court to ascertain as to whether he had applied his mind to the relevant factors which the statute requires him to do. The expression 'consider' is of some significance. In the context of the rules, the appellate authority was required to see as to whether (i) the procedure laid down in the rules was complied with; (ii) the Enquiry Officer was justified in arriving at the finding that the delinquent officer was guilty of the misconduct alleged against him; and (iii) whether penalty imposed by the disciplinary authority was excessive.

In R.P. Bhatt V. Union of India [(1986) 2 SCC 651] this Court opined:

> "4. The word "consider" in Rule 27(2) implies "due application of mind". It is clear upon the terms of Rule 27(2) that the Appellate Authority is required to consider (1) whether the procedure laid down in the Rules has been complied with; and if not, whether such non-compliance has resulted in violation of any provisions of the Constitution or in failure of justice; (2) whether the findings of the disciplinary authority are warranted by the evidence on record; and (3) whether the penalty imposed is adequate; and thereafter pass orders confirming, enhancing etc. the penalty, or may remit back the case to the authority which imposed the same. Rule 27(2) casts a duty on the Appellate Authority to consider the relevant factors set forth in clauses (a), (b) and (c) thereof.
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> "5. There is no indication in the impugned order that the Director General was satisfied as to whether the procedure laid down in the Rules had been complied with; and if not,

> whether such non-compliance had resulted in violation of any of the provisions of the Constitution or in failure of justice. We regret to find that the Director General has also not given any finding on the crucial question as to whether the findings of the disciplinary authority were warranted by the evidence on record. It seems that he only applied his mind to the requirement of clause (c) of Rule 27(2) viz. whether the penalty imposed was adequate or justified in the facts and circumstances of the present case. There being non-compliance with the requirements of Rule 27(2) of the Rules, the impugned order passed by the Director General is liable to be set aside."

In paragraph 13 of the memorial the appellant at the first opportunity raised a contention that the order of the appellate authority was not a speaking order at all, besides drawing the attention of the Chairman-cum Managing Director to the subsequent event namely the judgment and decree passed by the civil court. The said authority again did not apply its mind while passing his order dated 31st March, 1981. When such a contention was raised, it was obligatory on the part of the Chairman-cum-Managing Director while exercising its statutory jurisdiction to show that he had applied his mind to the contentions raised. Such application of mind on his part is not apparent from the order. The departmental proceedings are quasi criminal in nature.

The petitioner had again reiterated in his revision petition filed before the Secretary (Cooperation) that the enquiry was not conducted in accordance with law. The Additional Secretary (Cooperation) has also not taken into consideration the plea raised by the petitioner that the enquiry was not conducted in accordance with law. The Additional Secretary (Cooperation) was bound to consider the grounds taken in the revision petition.

The upshot of the above discussion is that (1) the petitioner has not been supplied with the copy of enquiry report dated 10.7.1997 before terminating his services; (ii) the petitioner had been seriously prejudiced by non supply of the copy of the enquiry report to him ; (iii) the disciplinary authority could not terminate the services of the petitioner before

permitting him to make a representation against the enquiry report;(iv) the appellate order dated 29.1.2000 and the order dated 16.3.2006 have not been taken into consideration the specific plea raised by the petitioner that the enquiry was not conducted in accordance with law.

For the foregoing reasons this writ petition is allowed. The order Annexure P-7 dated 22.9.1997, Annexure P-9 dated 29.1.2000 and Annexure P-11 dated 16.3.2006 are quashed and set aside. The petitioner will be deemed to be in service of the respondent No.4. It will open to the respondent No.4 to permit the petitioner to make a representation against the enquiry report dated 10.7.1997 and to proceed against him from that stage as per the law laid down by the Hon'ble Supreme Court in case Managing Director, ECIL, Hyderabad and others (supra).

There shall be no order as to costs.

June 28,2007 (g) **(Rajiv Sharma), J.**